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Social Powerlessness and the Quest for Political Legitimacy

Dominique Connan

- ¹ The 2007 General Elections in Kenya and the subsequent crisis badly damaged the country's international reputation, which had been economically flourishing, towards democratisation within a strong civil society. At a moment when the jolts from the political crisis have dissolved the myths and illusions from this exported image, it is important to reflect on one of its major bases: the Kenyan "civil society" that is often described as a solid rampart against the demons of authoritarianism, violence and tribalism. A definition of this civil society is required as an initial step towards studying it. It has very blurred outlines, whose ambiguous term of "civil society" bears whatever meaning the speaker wishes to give it.¹ It will be defined here as a collection of associated bodies that recognise the State as a monopoly of political power, while playing an influential and critical role towards it. It is within this framework that this definition stops at an Anglophone, secular human rights civil society in Kenya. Religious institutions, particularly churches, which play an important role within civil society, are not included in this definition.² What will be broached here is the issue of militia and of "militarized" groups that can be termed ethnic in terms of their relationship with the State, depending mainly on their areas of operation. The latter are often an ambiguous group that cannot easily be integrated within a reflection of "civil society." As armed organizations, the groups do not acknowledge the State as the monopoly for legitimate violence. This chapter will therefore limit itself to an evaluation of what influence the human rights civil society could have vis-à-vis these militia, who have often been the operators of post-electoral violence.
- ² This arbitrary choice of only considering human rights organisations is justified by the facts: the flag bearer of first, multipartyism then secondly, of constitutional reform since the beginning of the 1990s, this sector of civil society and the individuals in it were singled out during the electoral process and political mediations which followed the electoral irregularities. In addition to the justification of these events, they were the only organisations that could be studied from journalistic sources.³ The intention here is not to draw up an exhaustive list of non-governmental organisations (NGOs) that played a

role in the electoral process and its outcome. A modest attempt has been made to isolate the most outstanding examples, as well as various strategies unique to these actors in the context of the crisis that perturbed Kenya at the start of 2008. In order to understand the specific configuration of the 2007 General Elections and their challenges for civil society, a brief historical framework is required, bearing in mind that the civil society has barely found its place in the political chessboard since 2002. The chapter will pose some elements for reflection on the tactics aimed at making these organisations and individuals legitimate actors of the process to find a way out of the crisis. In conclusion, the paper broaches the issues that created this new configuration—the issues renewed as concerns the civil society in politics, of its independence from leaders and parties, and in fine, of its representation.

Constitutional reform since 1997, a vehicle for structuring the civil society

- 3 What is referred to as the human rights civil society is a recent phenomenon in Kenya. Its emergence as an influential force dates back to the end of the 1990s. Since then, it has adopted an equivocal attitude towards the government in power. Making a plea for political openness in 1997, the civil society greatly contributed to the victory of Mwai Kibaki in the presidential elections of 2002. However, the hopes for change brought about by the new regime were soon disabused. The failure of the constitutional reform process is symbolic of this disappointment more so as it had been the society's battle horse since the end of the 1990s. Nevertheless, the 2005 referendum allowed the civil society to once again take up its official recognition, first as an electoral observation force. The 2007 elections allowed continuity for the process of recomposing the role of the associations for civil rights protection.

Constitution and eviction of a social front for a political opening (1994–1997)

- 4 From 1994, the Law Society of Kenya, the International Commission of Jurists (Kenyan Chapter) and the Kenya Human Rights Commission introduced a Constitution project within which they defended a pluralist and democratic system. Indeed, it was only then that Daniel arap Moi's regime agreed to repeal Section 2A of the Constitution which instituted a single-party system, but this was merely a formality: the President still held considerable discretionary powers and a control of a repressive machine in terms of an authoritarian State. Although mainly emanating from professional lawyer organizations, this proposal was discussed and defended within a much larger scope. It soon acquired the support of major Christian organizations. A few politicians, among whom was Raila Odinga, also lent their support to this initiative. These diverse groups thus united as the Citizens Coalition for Constitutional Change (also referred to as the "4Cs"), and succeeded in persuading D. arap Moi to include constitutional reform in his political agenda. Additionally, the creation of an umbrella organization gave them an opportunity for foreign funding. This body was eventually confronted with a dilemma that it still faces today—the lawyer-based organisations were the only ones who could take pride in an alternative representation from the professional circle to which they belonged. The support of the churches to these demands, however, gave them a broad reach going

beyond the Anglophone urban centres where they had been expressed. But these NGOs had other needs—the formation of a social base of influence on the prevailing authorities; and the support of politicians whose priority was not so much the establishment of a democratic system in itself as the conquest of political power.⁴ This ambiguous position towards the opposition culminated in 1997, while the forthcoming General Elections converged the agenda of both the civil society and of the dissident politicians within the ruling party, KANU.⁵

- 5 In early 1997, a National Convention was held, bringing together the three large bodies that criticized the Moi regime—NGOs, churches and opposition parties, with variations in the level of involvement of each of them.⁶ The National Convention Executive Council, NCEC, gave President Moi an ultimatum, asking him to initiate constitutional reforms. At the same time, Protestant and Catholic churches⁷ met the President several times in order to compel him to launch an agenda of political openness. In view of the failure of these negotiations, the churches also gave an ultimatum to the head of State. These two deadlines were not respected. Both the NCEC and the churches found themselves in agreement and together called for demonstrations.⁸ While D. arap Moi desisted from brutally repressing them, they were able to meet all opposition, political and social movements, under a single reform banner. Ultimately, these events were as much a popular success as a political failure since they were not followed by any tangible effects.
- 6 The demands of the NGOs were relayed to Parliament while the opposition MPs agreed to vote on the budget, on condition of legal reforms. The revolt by these MPs threatened to render the county ungovernable. Similarly, the NGOs, increasingly egged on by donors, undertook massive civic education work in order to sensitize the masses on the need for reform of the regime. Fresh demonstrations were organized at the beginning of July 1997. This time around, they were ferociously repressed, but it led to an enlarged rank of reformists. In order to break this formidable alliance, D. arap Moi opted to negotiate with some of its members. He attacked the weakest links within this coalition, by initiating negotiations with the churches and the most influential members of the opposition. NGOs were excluded on the grounds of their lack of representation. Although these initiatives were not succeeded by serious measures, they hastened the split of the reformist front. This change in the president's tactics led to the radicalization of the non-religious civil society. The NCEC threatened to declare the National Convention constituent if substantial reforms were not taken before the General Elections in December. However, in the meantime, opposition MPs chose to directly negotiate with their KANU counterparts. This process resulted in the Inter-Parties Parliamentary Group—IPPG. This informal agreement engaged its parties, or hundreds of its MPs from all quarters to advocate for wide-scale reforms: independence of the Electoral Commission of Kenya (ECK), whose members would be nominated in equal parts by the ruling party and by the opposition; the repealing of repressive laws; equal media coverage by the governmental media; and the setting up of a Commission for Constitutional Reform. Although this agreement initially was lacking approval, it severely reduced the civil society's capacity to mobilize. The co-opting of their demands by a political class in full fighting form gear alienated the associations from the political scene.⁹ Despite the disqualification of the NGOs present, their pressure sped up the inclusion of legal and constitutional reforms on the political agenda.¹⁰ Nevertheless, the measures presented by the IPPG were subjected to a law which kept barely a third of the proposals of the agreement. It was voted upon just before the dissolution of Parliament, towards the end of 1997, while D. arap Moi

announced the General Elections for December. Making fun of an opposition that the IPPG had made into a laughing-stock, Moi was once again in a position to get rid of them.

From a political lobby to an electoral watchdog (1997–2005)

- 7 After his victory in December 1997, D. arap Moi appointed a Commission to negotiate constitutional reforms, in accordance with the IPPG proposals. This Commission, named after its chairman Yash Pal Ghai, succeeded in bringing together a considerable portion of the country's social forces. This gave it (the Ghai Commission) a level of legitimacy. It was also a means for D. arap Moi to defuse the mobilizing capacities that the secular civil society had displayed in 1997.¹¹ Delayed several times in its work by an executive power that wished to have control over the reform process, the Ghai Commission delivered a proposed Constitution just before the 2002 General Elections. This blew the wind out of the civil society's sails, which was still mainly composed of jurist associations, and it was hence marginalized in the electoral campaign. Nevertheless the society earned an indirect victory, with the budding NARC (National Rainbow Coalition)¹² taking up several suggestions into its programme. These associations still defend the programmes—human rights, civil freedom and the establishment of counter powers—to date. These demands served to cement an irregular NARC coalition that required such a programme to neutralize the dissidents within it.¹³ Finally, the Ghai Commission allowed the civil society to mutate in its role, one that would transform the jurist associations into political lobbies.
- 8 After M. Kibaki's victory in the Presidential election, an assembly of delegates comprising parliamentarians and District representatives came together to debate on the findings of the Ghai Commission. These discussions, "the Bomas meetings," emphasised the transformation of the civil society associations into pressure groups. New themes then emerged on the political scene, for example women's rights. However, the debates polarized the government and hastened the death throes of NARC's already fragile electoral coalition. Actually, many of M. Kibaki's former fellow travelers¹⁴ were uneasy about granting a constitutional reform which would weaken their power. They slowed down the negotiations as far as they could, through manoeuvres that affected their popularity. Only the NDP¹⁵ faction of the government, led by R. Odinga, wanted the reforms to succeed. These reforms would have given their leader the post of Prime Minister, as had been promised in the Memorandum of Understanding signed between all the parties within NARC before the elections. Because of this, the constitutional reform process, which initially resulted in major popular consultations, was largely amended by the prevailing authorities. This was done at the risk of losing all legitimacy.¹⁶ In order to counter this, M. Kibaki decided to submit the constitutional reforms to a referendum.
- 9 The referendum campaign was decisive in recomposing the role of civil society. Having been the battle horse of the NGOs since the beginning of the 1990s, the NGOs were particularly concerned by the failure of the constitutional reform process. Although they had been paralyzed during the 2002 elections, the referendum forced the civil society to play, at the very least, a role of critical observer. Therefore, the referendum took on an existential bearing to some extent for many organisations. This was also their opportunity for the NGOs to reposition themselves as legitimate actors of political reforms. Exasperated by the authorities' reluctance to concede to reforms, the NGOs undertook sensitization measures geared towards the voters' stakes and actions.¹⁷ A

preliminary civic education programme was organized for the public. Additionally, the NGOs created election watchdog groups. Several umbrella organisations and networks were created whose aim was to observe the voting process.¹⁸ The fears of electoral fraud were proved hence true, while the referendum campaign was shaken by the return of clientilistic practices of previous regimes.¹⁹ This was the perfect moment for united front, comprising NGOs attached to human rights. With the inspection of about 40 constituencies, these initiatives were a success as attested by the collapse of M. Kibaki and his allies.

The Kenyan civil society and the 2007 general elections: challenges of electoral observation

- 10 The experience of the referendum indicated the end of the transition begun by the Bomas meetings. Several professional went beyond judicial role that had hitherto been attributed to them. The constitutional reform process sped up its progress to a more active and transversal role of criticizing the actions of the regime. The 2005 referendum finally accorded them a new position in the electoral process. The 2007 general elections were, for the civil society, continuity of the referendum process.

Economic mobilisation factors of the civil society

- 11 The vigilance of the NGOs was motivated by several exogenous factors during the voting. On the one hand, the Electoral Commission of Kenya (ECK) debated upon since the beginning of multipartyism, had always been accused of partiality, as its Chairman and 20 Commissioners were appointed by the President. Several organisations asked, in vain, for its transformation into an independent administrative and financially autonomous body. The provincial administration, which traditionally campaigned for the Executive, were another cause for anxiety. Indeed, it appeared that the police force was dedicated to it, the ruling Administrative Police (AP) had received considerable reinforcements and new equipment in the months preceding the elections. Bypassing the regular hierarchy of the Kenyan police force, the AP, under direct orders from the President, aroused suspicions as to their integrity and those whom they served. The simultaneous decrease in human and financial resources of the General Service Unit²⁰ only added to these doubts. On the other hand, the brutal repression of the Mungiki sect in the mid-2007 was marked by several extrajudicial executions. The Kenya Human Rights Commission later revealed the existence of several graves, containing about 500 bodies.²¹ This discovery elicited the distrust of associations concerning police brutality, which the Kibaki regime engaged in. The NGOs' attention finally focused on the partisan bodies. The Orange Democratic Movement (ODM) was only formed in 2005, the Party of National Unity (PNU) was an electoral creation of M. Kibaki. The latter only saw the light of day in the election year. Moreover, these parties took the form of coalitions, which necessitated a primary selection of local candidates within the groups. The institutional weakness of the parties and the fluidity of their hierarchies resulted in control of the nomination of the parliamentary candidates from the two main political parties.
- 12 Organised in networks of several associations, the civil society evaluated the election process and the party primaries upto the announcement of the results by the ECK. Under surveillance were the education of citizens, media integrity, violence and the behaviour

of the police. More concentrated on observation of the process than on mobilisation of the masses, the NGOs played the role of expert rather than militia. The Kenya Human Rights Commission is particularly symbolic of this phenomenon. It recruited its members in the 1990s, drawing from exiled academics and political prisoners. Such personal characteristics were in the line with the demands of an organisation that was fighting for democratic space from the regime.²² During the General Elections of 2007, it displayed itself more as a research and political analysis organisation. Essentially a defender of human rights, it had a more passive role as guardian of the principles of political plurality and electoral justice.

The virtues and vices of a local electoral observation

- 13 Symbolic of this desire for control of the entire electoral process, the secular Kenyan civil society and the churches came together within the Kenya Elections Domestic Observation Forum—KEDOF.²³ Two months before the election, they hurriedly sent out about 450 observers to the 210 constituencies of the country, whose mission was to report all anomalies relative to political parties, gatherings and pre-electoral violence. Finally, on the day of the voting, 17,000 observers descended on almost 20,000 voting stations to inspect the election process.²⁴ It is likely the scope of this mission that enabled one of the coordinators, Koki Muli, to get accreditation by the ECK on the night of 29 to 30 December, in order to verify the integrity of the counting process held at the Kenyatta International Conference Centre, KICC.²⁵ Because of this, although the network attested to the credibility of the voting process in majority of the voting offices, they contributed to questioning the ECK in the detailed accounting of votes, which were judged fraudulent.
- 14 At the end of the day, these electoral observation initiatives revealed their sanction, along with foreign organisations. Despite having been invited and accredited by the government, electoral observers contradicted the authorities, and there is the risk that they may be excluded from subsequent electoral processes. And even if these observers took the risk of criticizing the election process, their conclusions were not followed by action. However, these observations eventually served as the basis for a petition, and this strengthened the opposition in officially contesting the results without offering an alternative. Until this time, election observers only had to confirm major victories since the beginning of multipartyism in 1992. From a functional point of view, observers contributed to increasing the legitimacy of the victor by attesting to the regularity of his ascension to power conforming to imported democratic standards. The 2007 elections posed the new problem of a highly contested poll, with an uncertain result. This time around, the civil society had to ratify a political crisis, without even having the means to advance a solution to this state of affairs. In the final analysis, the normative standards of the observers should be put to task. It has since been admitted that, in Kenya, the legitimacy of leaders was historically built on a clientilistic and patrimonial base. There is now room to interrogate the relevance of the electoral norms advocated by the civil society. The players and the referee were not playing to the same rules. Hence, legitimacy of political leaders is the fruit of a weak institutionalization of State power, what comes to light is a perverse effect of electoral observation: the financing of these operations by foreign donors created an eviction effect that sanctions public institutions, which are normally dedicated to the surveillance of the elections. The money given to the civil society did not contribute to the development of the administration, but more to the

“privatisation” of state functions. Evidently, the civil society’s adoption of the electoral standards given by the international institutions is a main source of extroversion, which contributed to a collection of resources, this resulting in a huge personnel base. As a confirmation, it allowed the civil society—whose representation is questionable—to morph into a legitimate actor on a political scene, whom it would be naïve to consider as being neutral. The crisis which followed the elections tended to confirm this view.

Peace with or without justice: a divided civil society

- 15 The crisis, initiated by strong suspicions of voting irregularities, brought the presidential team back to back with litigation and an opposition that could also have been accused of electoral fraud. As large portions of the country plunged into violence, the legitimate political representatives were unclear. Under these circumstances, then, the civil society seemed to be an ideal mediator. However, this situation greatly polarized: there was a clear pacifist faction which considered a return to calm as preferable to respect for democratic principles and the opposition’s political expression. Opposing this, a camp regrouped under the banner of upholding democratic principles. This latter insisted that a return to calm would only be sustainable if the government agreed to respect democracy and to resolve various latent social problems. Top of these challenges was the redistribution of land and economic resources, and a constitutional reform specifically geared to balance Executive Powers. This split often marked the border between secular groups and the churches. Divided by this conflict in interpretation, the civil society organisations were in a competition whose challenge was to find the legitimate representation of the crisis.

Polarisation of the civil society

- 16 The political crisis deeply divided the Anglophone civil society. Each of these camps claimed to play a role in the negotiations between the two political parties. The first group that can be distinguished is the organisations that consider peace as a priority in the resolution of the electoral differences. For this group, it didn’t matter much who won, as long as the violence ended and the country was united. Along with the evidence that the sympathisers of M. Kibaki and the PNU brought forward, this faction also had a strong Christian tone. Specifically, it should be noted that the Anglican and Catholic churches of Kenya campaigned in favor of M. Kibaki, and acted as a relay for him during the campaign. This situation was intensified by the alliance made between R. Odinga and the Muslim communities.²⁶
- 17 The most notable personality of the pacifist group was Ambassador Bethuel Kiplagat. A specialist in conflict resolution with more than 20 years experience, he had presided over negotiations during the Ugandan conflict in 1985–1986; he led a team on conflict resolution in Mozambique in 1988–1992, until he became Kenya’s special envoy for the peace process in Somalia. Currently, he is the director of the African Peace Forum, member of the International Crisis Group and Permanent Secretary in the Kenyan Ministry of Foreign Affairs. Renown for peace in Africa, his message has deep Christian undertones. B. Kiplagat faces the crisis from the view of God’s creation rather than antagonistic interests. His assessment of the situation is that it is a result of sin and that there would be public prayer, forgiveness and reconciliation.²⁷ In his wake, several ad hoc

organisations became heralds of unconditional peace. An example of this is the “Heal the Nation” campaign that organised a deposit of flowers for peace in the City Centre. All these movements had ostensible political sympathies. At the beginning of February, B. Kiplagat led a delegation of Concerned Citizens for Peace to distribute water, food and telephone calling cards to the anti-riot police stationed at Uhuru Park.²⁸ This latter were charged with preventing access to the park and thus any political demonstrations. The same goes for Maendeleo ya Wanawake, which led female processions entreating the belligerents to bury the hatchet. They did this at the St Paul’s Cathedral in Nairobi. These group processions were then in tandem with the Catholic priests on injunctions to the government against using security forces to restore order and bring an end to human suffering.²⁹

- 18 These appeals for unconditional peace resonated with those of several other organisations whose interest was in a cessation of violence, albeit to the detriment of a political solution. Numerous hotel and tourist associations, and especially professional and business associations were a part of it.³⁰ The Coast Kenya Association of Hotelkeepers estimated that several hotels at the Coast and about 20,000 people were technically unemployed as a result of the postelectoral situation.³¹ Banks, together with churches and the government media, published peace appeals in the press.³² This shows that the majority of churches and several business associations, in their unconditional appeal to peace, were allies of the Kibaki regime.
- 19 Parallel to this pacifist civil society, a faction of organisations defending electoral justice and critical of M. Kibaki’s civil “coup d’État” was organised. The first to make known their rejection of the results announced by the electoral commission was the Law Society of Kenya—LSK. It contested the validity of the results the morning after the election and rapidly suggested the setting up of a transition government in order to plan new elections. This jurists’ organisation lay violent charges against the electoral commission. They demanded that the commission be relieved of their duties and that an independent body takes over the organisation of elections in the constituencies where the results had been cancelled.³³ Finally, its vision of the crisis was much more political than that of the pacifist organizations. The LSK supported the crisis resolution process led by Kofi Annan, but nevertheless called for a solution based on power-sharing with the creation of the post of Prime Minister with executive powers. Thus, it once again took up its battle horse of the 1990s, by calling for the adoption of the initial constitutional reform proposals, the Bomas Draft, which emanated from popular consultations. The demands of the Kenyan Chapter of the International Commission of Jurists—ICJ, were of a similar nature. The impasse in which the country found itself was resolved in the law, from where all power emanated. In January, the ICJ demanded the creation of an interim government, based on a coalition principle, to be led by civil servants and technocrats. Its mandate would be to stabilize the country and solve the problem of the internally displaced persons. They launched a verbal attack on the ECK, which despite what its Chairman claimed still had the power to cancel the elections. The Constitution actually provided that all constituted bodies had the power to cancel its own acts. For the LSK and the ICJ, just like for many other secular jurist organisations, the crisis was the proof that constitutional reform that would limit the powers of the Executive was urgently needed. The situation demanded not just a temporary political regulation but a complete overhaul of the juridical system for the country, and a new social contract with Kenyans.³⁴

- 20 In January, a lobby comprising about 30 Kenyan organisations was created, focusing on a demand for unconditional civil peace. There was a large variety of associations in this group: jurist organisations such as ICJ, LSK, Kituo Cha Sheria and East African Law Society; human rights protection lobbies such as the Kenya Human Rights Commission; and development organizations such as Mazingira Institute. Led by the IED, the electoral observation unit of KEDOF was also included. The Kenya National Commission on Human Rights took over the leadership of this group, under the collective name of Kenyans for Peace with Truth and Justice—KPTJ.
- 21 The political position of the leaders of these organisations was quite similar. They first supported the declarations of the KEDOF observers who had recorded electoral fraud during the vote counting process on 30 December 2007.³⁵ K. Muli, of the IED, declared to the press that the 2007 elections had the makings of a “coup d’État” and that it was a disastrous day for Kenyan democracy.³⁶ Maina Kiai, head of the KNCHR, agreed with this assertion, in the months prior to the elections, the KNCHR had warned of possible fraud by a biased electoral commission.³⁷
- 22 The KNCHR is a public institution, legally established by law in 2002 as an independent commission charged with the protection of human rights in the country. Since 2003, the commission has been headed by M. Kiai, an extremely active militant and a lawyer by profession. Before taking up this position, he founded the Kenya Human Rights Commission in 1992, and was its Director until 1998. He actively participated in the battle for constitutional reform in the 1990s, within the 4Cs, which at that time was in the NCEC. He was then appointed Director of the Secretariat of Amnesty International in London. He held this position for three years before becoming the Director of African Programmes of an American NGO, the International Human Rights Law Group. This is a foundation that develops financing and cooperation programmes with national human rights protection groups. He was the main actor of the lobbying led by KPTJ in the post-electoral crisis. His position as chairman of a public institution, going by his past as a militant jurist, made him one of the most legitimate actors on the national scene and a person with whom international institutions and mediators had a special relationship. He played a crucial role in the conflict between NGOs on the definition of the crisis, as well as in the unacceptability of a fraudulently elected President.
- 23 Finally, several other groups led initiatives aimed at the protection of human rights which were threatened by a politically explosive situation. This resulted in the Amani groups. Amani Mashinani Initiative is a union of Kenyan associations for the protection of human rights. It is mostly established in informal residential settlements of the country. The groups distributed humanitarian aid and held reconciliation meetings aimed at uniting local political leaders. Additionally, Amani Focus attempted to organise tours by the political leaders to the violence-prone areas, so that they could spread a message of peaceful resolution to the conflict.³⁸

Crisis caused by a repeat of the voting: the KPTJ and criminalisation of the ECK

- 24 The KNCHR stands out by its assertion of independence from the government. Before the election, the commission had been requested by the government to draw up a report on violence and human rights violations during the campaign period. At the beginning of January, the government, through its spokesman Alfred Mutua, detained this report.

They zeroed in on the issues that could result in getting R. Odinga's ODM charged before the International Crime Tribunal in the Hague. The government accused ODM of "ethnic cleansing" and of having premeditated and precipitated violence that resulted in hundreds of deaths in the Rift Valley and the western parts of the country. In reality, these were old accusations, rooted in the controversy during the campaigns that accompanied the majimbo debate. M. Kibaki's camp had accused the ODM of stirring up ethnic cleansing under the guise of regionalism.³⁹ From the moment that the electoral rigging plunged the country into violence, faced with police repression, the ODM was the first to accuse the government of "ethnic cleansing." This accusation probably sped up the involvement of the international community in the crisis resolution. However, both the presidential camp and the opposition continued in mutual accusation of these crimes, consequently resulting in the terms "genocide" and "ethnic cleansing" constituting a repertoire of widely recognized terms.⁴⁰

- 25 The KNCHR refused to present its report to the government, which it considered illegitimate, and said they would only settle the score in Parliament. Additionally, the spokesman of the KNCHR announced that the commission had decided to inquire into extrajudiciary executions committed by the police and security forces during the repression of riots and demonstrations. In the election observation report was presented in mid-January, the commission stressed on the irregularities throughout the voting process, assessing the rigging in favor of M. Kibaki at more than 450,000 votes. This was followed by an attack against the international organisation Human Rights Watch, that published a report stating that the post-electoral violence had been organized and premeditated by the ODM.⁴¹ The KNHRC, which can pride itself on having a large body of international experts at its disposal, led a counter inquiry in a majority of the towns affected by violence, in Kericho, Nakuru, Eldoret, Kisumu, Kakamega and Kitale.⁴²
- 26 At the beginning of January, Kenyans for Peace, Truth Justice (KPTJ) come up with a brief manifesto recognising the peace efforts led by the churches, but attributed the main cause of the crisis to a rigged election.⁴³ It also denounced police brutality as equal to the atrocities of the militia and political violence. The group openly declared that it did not recognise M. Kibaki as head of the Kenyan government, and asked the international community to do the same. By mid-January, the group had become more radical in the face of the unconditional pacifists who threatened to bury democracy in the name of security. As a reaction, it changed its name to Kenyans for Peace, with Truth and Justice. It made use of KNCHR conclusions in a much more explicitly militant manner. At the end of January, it published a report titled Countdown to deception: 30 hours that destroyed Kenya, in which a blow-by-blow account of the entire fraud committed by the ECK was given. Consequently, the KPTJ demanded that S. Kivuitu, along with his 21 commissioners be charged in court. In addition to this, the NGOs prepared a document listing all the issues that they blamed the commission for, amounting to several crimes. This was aimed at ensuring that negotiations for real constitutional reforms returned to the agenda, which guaranteed the separation of powers and independence of the judiciary. Basically, the violence and the impasse in which the country was in were only the outcome of a reform process that has been delayed too long. These initiatives to sue Kibaki's regime and to place constitutional reforms on the agenda largely dominated the political scene.
- 27 However, apart from accusing the ECK, the organisations for the protection of human rights were careful about attributing responsibility for the violence. It appeared that dialogue would be the only means to resolve the crisis and it therefore seemed imprudent

to blame one camp more than the other. Several times, leaders such as M. Kiai suggested that the situation was only a result of the latent conflict that had eroded the country since the beginning of the 1990s—the militia had not been disarmed; land conflicts had not been resolved. In order to allocate responsibility for the violence, the organisations called for the setting up of an independent international commission. They were wary of supporting the demonstrations organised by ODM, for fear of deadly outbursts.⁴⁴

Attacks and counter-attacks: survival strategies and political positioning of the civil society

- 28 In its undertaking for a postponement of the regime's reform agenda, the secular civil society initially came up against counter-attacks from M. Kibaki's team. Several of its (civil society) most eminent representatives were threatened. However, the commencement of round of talks under the guidance of K. Annan opened up an arena in which the civil society could be reconstituted as a legitimate and credible intervener.

The government camp—caught between response and repression

- 29 At the beginning of January, the ODM appealed to its supporters through the press to stage a huge demonstration against the “stolen” elections. The government responded, through the press as well, insisting on the illegality of political gatherings and emphasizing the regularity of the vote. Peculiarly, the sympathisers of M. Kibaki often attempted to mimic the announcements of the civil society in order to counter the mobilisation calls launched by the opposition. This saw the publishing of a series of announcements signed by the Kenyans for Peace and Progress, an association with neither address nor location, which claimed to be founded on the eternal principals of democracy, honesty, truth and justice. The announcements, running on two full newspaper pages, depoliticised the stakes of the demonstrations in a paternalistic tone, basing its argument on the misfortunes of the ordinary Kenyan, victim of the opposition's political maneuvering. Emphasising the worthlessness of demonstrations and the number of violence victims, the adverts then published an inventory of the MPs' privileges: salaries, official vehicles, exorbitant bonuses. The group postulated that the MPs would never send their children to risk their lives in such ventures, concluding, “*Say no to unlawful political activities that will not feed, clothe, or educate your family.*”⁴⁵ Kenyans were referred to their disillusion, their own misery and the powerlessness of political mobilisations in the resolving of daily challenges. This phenomenon indicated that the civil society and its modes of expression were taken seriously by the government camp, which in turn launched whitewashing tricks in the media to counter these messages.
- 30 Playing their classical card of intimidation, the M. Kibaki camp attacked leaders who challenged the validity of his re-election. Consequently, the Nobel Prize winner, Wangari Maathai, having been defeated in her quest for the Tetu Constituency parliamentary seat, raised her voice even louder as she ran no political risk. Contesting the validity of the governmental Peace and Reconciliation Commission nominated by M. Kibaki and headed by Vice-President Kalonzo Musyoka, she declared that the chaos was the result of the President's policies that had been carried out since 2002.⁴⁶ Apart from this she demanded that the government be held accountable for the victims of violence and the destruction, criticising its incapability to protect Kenyan citizens.⁴⁷ The very next day, the bodyguards

that she had had since winning the Nobel Prize, were withdrawn.⁴⁸ Also affected by governmental intimidation was M. Kiai, for whom pressure from the authorities was not a new experience. Fearing for his life, he was obliged to temporarily flee the country.⁴⁹ In September 2006, his criticism of the government resulted in his being accused of corruption and nepotism, in his position as chairman of the KNHRC. The intimidation of critics of Kibaki regime was child's play to the supporters.

Extroversion and response of the political scene

- 31 The start of negotiations for an exit from the crisis led by K. Annan obliged the civil society to play the role of legitimate actor in a new setup. Although having the de facto role of the opposition by challenging M. Kibaki's legitimacy, it (the civil society) was consulted as a neutral player before beginning of the talks. However, it is mainly by intense lobbying abroad that these associations, headed by KNHRC, were able to impose their point of view on the negotiators in setting the agenda for an end to the crisis. These international homologation techniques towards a local official recognition revealed local extroversion strategies.⁵⁰ In mid-January, M. Kiai presented himself at the African Union conference, where the situation in Kenya was high on the agenda, in order to bring forth his views and to block the presence of Kibaki who intended to crown himself Head of State. He then hurriedly dispatched a team from the KNHRC on a European tour: first to Geneva, in order to alert the United Nations on the violations of human rights that the Kenyan police were accused of.⁵¹ Then, it was off to England to discuss the situation with Lord Malloch-Brown, the British Minister of *African Affairs*, who K. Musyoka was also to meet. The final point of this tour was M. Kiai's address to the American Congress. Invited by the Committee for Africa and World Health, he gave assessment of this situation, the political, social and legal crisis, focusing on these more than genocide or ethnic cleansing. On these grounds, he asked the United States to freeze all military aid and trade with Kenya, until an interim government was formed. He opportunely requested that all humanitarian aid be channeled through NGOs rather than State organs. Finally, he called for an independent foreign investigation on the results of the presidential election. His demands were taken up by the Democrats in Congress. It is significant that the very same week, the US Secretary for *African Affairs*, Jendayi Frazer, came up with the notion that M. Kibaki's camp might be victims of ethnic cleansing.⁵² This was the perfect opportunity for the Democrats to use the baton that M. Kiai had offered them, to fight the Republicans with.
- 32 Thus armed with the approval of many high-ranking foreign representatives, M. Kiai and the KNCHR representatives coalesced into a pressure group of the Kofi Annan negotiation team. In the absence of strong social support in Kenya, they managed to put on the agenda several problems that the government would have preferred to avoid. The international ratification, facilitated by the professional biography of its main broker, thus served as an internal official recognition of the records. KNCHR successfully requested the establishment of a Truth, Justice and Reconciliation Commission, whose role it would be bring up genuine legal, social and economic issues from the crisis.⁵³ The issues of constitutional reform and the creation of a counter authority institutionalised by the position of Prime Minister with executive powers, returned to the forefront with massive support.

Subsidiary reasons for the crisis

- 33 It is significant that the uniting of the secular civil society with the KPTJ group did not completely dilute the multiple causes represented by its various components. The use of a woman's image by the two antagonistic factions of the civil society is a case in point. Several times, the pacifists referred to women as the first victims of postelectoral violence, and as the main guarantors of peace. It is a procession of women that deposited flowers and provisions at the feet of armed policemen at Uhuru Park. Groups of women for peace were formed. The democratic civil society, however, preferred to politicise the issue. They did this by not allowing the pacifists to have the monopoly of a feminist viewpoint and the use of a female figure. Thus, the Federation of Women Lawyers—FIDA, accused the police of doing little to stop the harassment of female refugees in Naivasha. Through its chairperson, Violet Awori, FIDA became part of the KNHRC committee on this issue. The committee announced that the problem would be brought to light as soon as order was re-established, sending the women's cause back to its subsidiary. FIDA's demand must not be seen in isolation from the clear ingenuity in its declaration. In the battle for the establishment of an official representation of the conflict, the appropriation of a specific cause through a camp is a sizeable challenge.

Conclusion

- 34 The actions of the Kenyan civil society during the 2007 elections raised several questions that have yet to be answered. The first is that of its representation. The importance taken by international approval in the national recognition of this civil society was evident. Beyond the resources of the extroversion, it appears that structuring the civil society to churches was a major factor in its social recognition. It also seemed to be the only resource that could go beyond the Anglophone professional and urban framework for a resolution of its problems. Also outstanding is the multiplicity of its organisations, in comparison to the feeble number of the noteworthy individuals of this civil society. The tide of acronyms that accompany every political failure, notwithstanding, going by press articles, the true forces remain very few. Therefore, it can ironically be stated that at the beginning of the 1990s, the civil society in Kenya comprised 30 people spread out in 60 organisations.⁵⁴ Things do not seem to be much different today, where NGOs often appear to be no more than names borrowed by individuals with NGOs multiplying in tandem with their militant identities. The plethora of organisations is often represented by the same individual actors.
- 35 Finally, the issue of the civil society's representation of human rights seems to be much more important as it is separated from the militarized and vernacular sphere of influence operational in rural and urban areas. These latter do not seem to be captured by political negotiations at the higher echelons of human rights associations have no common forum with the militia, or even with local organisations who made distribution of land and economic resources their *raison d'être*. This leads to the issue of the civil society's independence vis-à-vis the positions taken by the political parties. The deep split apparent in Kenya today produces a situation where the civil society plays a *de facto* role of the opposition. Fighting against the possibility of a democratic alternative, it still acts as an opposition whose aim is not so much respect for political plurality as access to

power. This was clearly displayed by the civil society rallying behind M. Kibaki and his dashed hopes in 2002.

- 36 Ultimately, it would be worthwhile to recapture the terms of an analysis made ten years ago by H. Maupeu and J. Lafargue.⁵⁵ On the eve of the 1997 General Elections won by Moi, the two researchers bitterly acknowledged the existence of a civil society that, despite its organisation and plurality, turned out to be incapable of overthrowing a regime that had become unpopular. This echoed E. Gellner's thought,⁵⁶ who posited that the contemporary civil society found its strength in economic growth and civic duty, arguing that although these components had been well presented within the organisations studied, their projects were too radical and contradictory to be operational. This statement still holds water today. The projects of the churches and human rights organisations were shown to be divergent during the crisis, while their de facto respective convictions led to partisan support. Although these were certainly sensible points of view, they were opposed to each other. Beyond this basically conjectural assessment, it should also be noted that the civic duty advocated by the organisations was strongly damaged by the unequal redistribution of the fruit of economic growth in the past five years. Rather than strengthening the rules and institutions of democracy, one could hypothesise that these economic inequalities emphasized the local and imaginary conflictual ethnic identities. The huge geographic polarisation of the election results tends to confirm this. From the moment that the voting results were declared as having been rigged by the governmental team, the civic lessons offered by the associations have had little value. Although the revolt during the first days was undoubtedly guided by the feeling of a rigged election resulting from popular domestication of democratic standards, these were possibly only for the losers of the day. For a short while, they ceded to a collective imagination of exit from the crisis based on evictions and "each to his own." This former, a product of a very radical interpretation of majimbo, was carried out by militia who to date have not been disarmed, despite a fortunate cessation of the tensions. The events at the beginning of 2008 therefore show the fragility of the human rights civil society, of its ideals and its victories. The standards that the associations still had, from an operational point of view, are still merely a body of negotiable norms in terms of current partisan interests. Whereas the exit from the crisis is a reason for optimism, statements by the authorities, and especially the weaknesses of the civil society, are not very different from what was ten years ago.

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NOTES

1. For a more complete history of this expression's various definitions, see F. Rangeon, 1986.
2. See the article by Hervé Maupeu, 'The role of religious institutions,' in this volume.
3. Mainly *The Daily Nation* and *The Standard*.
4. For more on the debates summarized here that animated the 4C's from 1994 to 1997, see R.-M. Peters, 2001.
5. The former single party, Kenya Africa National Union, which had been in power from independence upto 2002.
6. These were the churches, albeit with large divisions between the evangelical and fundamentalist Protestants, often loyal to the political power under Moi, and the 'liberal' Catholic and Anglican churches. The latter radicalised their message in the 1990s during several traumatic events—the assassination of Robert Ouko, the minister for Foreign Affairs, the violent repression of the "Saba Saba" riots, and the first 'ethnic cleansings' organised by the authorities in Rift Valley. These events led the Catholic and Anglican churches to more openly oppose the head of state and to legitimise its position. This entry into politics was a very big step in the constitution-making process in Kenya's civil society as it is owed to the churches, right from the 1992 elections, the initial civic

education programmes aimed at sensitizing the masses about multipartyism. However, despite being accustomed to working together within an ecumenical dialogue, the churches have always had difficulties in maintaining a united front during electoral periods. For more on this subject, refer to H. Maupeu, 1997.

7. Through the National Council of Churches of Kenya, the ecumenical meeting of the 'liberal' Protestant churches of Kenya.

8. A detailed description of these demonstrations and of their emergence conditions is given in R.-M. Peters, 2001.

9. C. Thomas, 1997.

10. A. Oloo, 2007 ; R.-M. Peters, 2001.

11. H. Maupeu, 2004.

12. A coalition of political parties created to knock down the regime of D. arap Moi during the 2002 General Elections in which M. Kibaki was the candidate.

13. H. Maupeu, 2003.

14. All from the Democratic Party (DP).

15. National Democratic Party, one of the constituents of the NARC coalition, along with the declining barons of KANU and of M. Kibaki's DP.

16. See L.W. Maina et al., 2006.

17. Examples are the initiatives of the Constitutional Reforms and Education Consulting, Community-Based Education for Development, Citizen Coalition for Constitutional Change.

18. Constituency Electoral Monitoring Project, Kenya Civil Society Referendum Observation Program along with the Electoral Observers programme led by the Kenya Human Rights Commission-

19. Illegal land allocation, degazettement of National Parks, among many other processes.

20. A paramilitary élitist police group, ordinarily charged with the responsibility of breaking up riots.

21. *The Standard*, 6 November 2007.

22. M.-E. Pommerolle, 2002.

23. Co-directed by Koki Muli of Institute for Education in Democracy and Oliver Kisaka, of the National Council of Churches of Kenya.

24. Kenya Elections Domestic Observation Forum, 'Preliminary Press Statement and Verdict of 2007 Kenya's General Elections.' 31 December 2007.

25. Along with, on behalf of the civil society, J. Melli of the Association of Professional Societies of East Africa, B. Sihanya of the Faculty of Law at the University of Nairobi, and H.M. Yusuf, of Supreme Council of Kenyan Muslims—SUPKEM. In addition to these representatives, two members from every political party were admitted.

26. International Crisis Group, *Kenya in crisis*, Africa Report, no. 137, 21 February 2008, 35 p.

27. 'Interview with Ambassador Bethuel Kiplagat.' *Wajibu, a Journal of Social and Religious Concerns*, Issue 17, [On line] URL: http://africa.peacelink.org/wajibu/articles/art_2122.html [archive].

28. *The Standard*, 5 February 2008.

29. *The Standard*, 1 February 2008.
30. For example the Kenya Private Sector Alliance, *The Standard*, 20 January 2008.
31. *The Standard*, 21 and 24 January 2008.
32. An advertisement by the Anglican Church of Kenya, the Methodist Church of Kenya, the Kenya Broadcasting Corporation (public television channel) and Equity Bank, 'Restoring Hope Together,' published in *The Standard*, 18 January 2008.
33. *The Daily Nation*, 10 February 2008.
34. *The Standard*, 27 January 2008.
35. 'Countdown to deception: 30 hours that destroyed Kenya.' Kenyans for Peace with Truth and Justice, January 2008.
36. Reuters, 31 December 2007.
37. This was done in a memorandum addressed to President M. Kibaki in March 2007.
38. Kenya Human Rights Institute, *Special Brief: Civil Society Responses to the Kenyan Crisis*, February 2008.
39. Cf. International Crisis Group, *op. cit.*
40. *The Standard*, 3 January 2008.
41. *The Standard*, 30 January 2008.
42. Its members were involved as observers in the conflicts in Darfour, Sierra Leone, Kosovo, East Timor Oriental, Cambodia and the Balkans. One of them even questioned the crimes ascribed to the Nazi regime. *The Standard*, 5 February 2008.
43. Online statement by Kenyans for Peace, Truth, Justice, 5-01-2008, URL: <https://www.wedo.org/wp-content/uploads/kenyans-for-peace-truth-and-justice.pdf> [archive].
44. Cf. for example M. Kiai, Discours au Congrès américain, 6-02-2008, [on-line] URL : <https://allafrica.com/stories/200802080688.html> [archive].
45. *The Standard*, 15 January 2008.
46. *The Daily Nation*, 21 January 2008.
47. *The Daily Nation*, 23 January 2008.
48. *The Daily Nation*, 24 January 2008.
49. *The Standard*, 24 January 2008.
50. J.-F. Bayart, 1999.
51. *The Daily Nation*, 22 January 2008.
52. *The Daily Nation*, 8 February 2008.
53. *The Daily Nation*, 15 February 2008.
54. R.-M. Peters, 2001.
55. Maupeu and J. Lafargue, 1998.
56. E. Gellner, 1991, cited in H. Maupeu and J. Lafargue, 1998.

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